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EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1323~~ 813

THE UNION TRUST COMPANY OF NEW YORK, TRUSTEE, PLAINTIFF IN ERROR,

vs.

JACOB BINZ, THE HOUSTON, EAST AND WEST TEXAS RAILWAY COMPANY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

RECORD FILED OCTOBER 2, 1890.

Assignment of Errors by Union Trust Company of N. Y.

* * * * * * *

(Record, p. 472 to 478.)

III.

The court erred in adjudging that such of the creditors of the railway company as are adjudged to have a statutory lien as named and classified by the court in its decree are entitled to priority in payment of their claims over the company's first mortgage, because their lien was created by statute of February the 18th, 1879, and the proof shows that said first mortgage was made on the 1st of May, 1878, and was recorded when the statute was passed, and the bonds which it was made to secure had been issued and disposed of in part when said statute was passed, and to give said statutory lienholders priority of right to payment of their claims over said first mortgage is to make said statute retroactive and to impair the obligation of said mortgage contract in violation of sec. 16 of the bill of rights of this State, and also in violation of sec. 10, art. 1, of the Constitution of the United States of America.

IV.

The court erred in adjudging that the claims in Exhibit "B," aggregating thirteen thousand one hundred and thirteen dollars ($13,113.00), and the claims specified in Exhibit "D," amounting to three thousand one hundred and forty-three dollars ($3,143.00), and the claims specified in Exhibit "E" of the special master's report, amounting to five thousand one hundred and eighty-three dollars ($5,183.00), all of which are embraced in the court's classification of "statutory claims" (see Tr., p. 184 and 188), are liens, by statute or otherwise, on the railroad and appurtenances, because the master's report (Tr., 142 and 143) shows, and there is no other testimony on this point, that they are not the claims of mechanics, laborers, or operatives who had performed labor in the construction or repair of the road, its cars, locomotives, or other equipments or who had performed labor in the operation of the road and to whom wages were due and owing for such service within the statute entitled "An act to protect mechanics, laborers, and operatives on railroads in the payment of their wages, and to provide a lien therefor." (R. S., p. 469.) Hence none of said claims come within the letter or spirit of said act.

And, for the reason assigned in the third assignment of error, the court further erred in adjudging said claims to have priority to payment over said first and second mortgages; but if they be held to be liens, then certainly they could not have priority over the first mortgage, which was made and recorded eight months before the statute was passed which gave the lien.

V.

The court erred in adjudging to Jacob Binz $22,013.18 as statutory liens, as appears in the column marked "statutory liens" (see Tr., p. —), and also in the judgment of the court. (Tr., p. —.)

It appears in Exhibit "A" of the master's report (p. 183, Tr.) the special master had allowed Binz $3,517.80 on claims for "labor on which time checks or voucher was issued and assigned to Binz."

And in Exhibit "C" of said special master's report (Tr., pp. 185 and 186) the master had allowed said Binz on "promissory notes given by the company for labor" $17,180.11, and in Exhibit "D" of said special master's report (Tr., p. 188) said master has allowed him upon "promissory notes given by the railway company for board bills" $1,315.27.

These three allowances make the sum of $22,013.18 which the court allowed as "statutory claims" and entitled to lien and priority to payment. (Tr., p. —.)

No objection is made to the allowance of the item of $3,517.80, but the specific errors contended for in this assignment are, first, that the item of $17,180.11 is composed of notes given for time checks and time tickets held by said Binz, which notes were made payable to Paul Bremond and by him endorsed.

If said time checks and tickets in the hands of Binz were a lien under the statute, then accepting the company's notes, payable to a third party and by him endorsed, was the taking of another and independent security for the payment of the same, which presumptively was in lieu of the lien which he claimed under the statute and the waiver of it, unless he proved, further, that at the time he accepted said notes it was agreed between him and the railway company that he did not thereby waive his lien, or that said endorsement was intended only as an additional security, but there was no such testimony, and the court held erroneously that the *onus* was upon the bondholders to show that the parties intended thereby to waive the statutory lien, if any the holder of the ticket ever had, and thus destroyed and rendered nugatory the legal presumption arising from the admitted acts of the parties.

The item of $1,315.27, as shown in Exhibit "D" of the master's report aforesaid, was entitled to no statutory lien, because the master's report shows, on pages 144 and 188, that said item is composed of notes given by the company for board bills, which notes were payable to a third party and by him endorsed, and if the claims for which said notes were given had any lien under the statute that lien was waived by accepting another and independent security for their payment in the absence of proof showing that the endorsement of Bremond was intended as an additional security.

VI.

The court erred in its finding of fact in paragraph 12 (see Tr., p. —) in finding:

1st. "That so much of said claims as are embraced in the column marked 'statutory claims' were for debts due and owing by said

railway company to mechanics, laborers, or operatives for labor performed in the construction or repair of the railroad, locomotives, cars, and other equipments of said railroad company or for labor performed in the operation of said railway, upon which steps for the enforcement of a lien under the act of 18th of February, 1879, relating to railroad laborers' liens, were duly taken within 12 months after the creation of the lien by intervening in this suit, and that such lien has in no instance been waived, and all notes taken for such claims were given and received without any intention of waiving the lien and for the purpose only of convenience in ascertaining the amounts due."

Because the court included in the column marked "statutory claims" the claims which the special master specified in Exhibit "B" of his report, amounting to $13,113.31 (see Tr., p. 184), which he classified as "claims of boarding-house keepers" and "boarding-house claims assigned," and included also in said column the claims specified in Exhibit "D" of said special master's report (see Tr., p. 188) as "claims upon promissory notes given by the company for board bills," amounting to $3,143.00, and also the claims specified in Exhibit "E" of said special master's report (see Tr., p. 188) as "notes given for groceries and provisions furnished boarding-house keepers," amounting to $5,183.05, when the proof shows that none of the persons originally claiming said demands had labored in the construction or repair of said railroad, its locomotives, cars, or other equipments or in its operation, or that a lien was contracted for between the parties (see Tr., pp. 142 to 144, inclusive), which is all the evidence on this point; and there was no testimony showing or tending to show that notes were given for the purpose only of convenience in ascertaining the amount due.

2nd. The court further erred in its finding, in the same paragraph—

"That at the time the act of February 18th, 1879, took effect no rights had vested under the first mortgage except the amount evidenced by the first 280 bonds issued under it, and the bonds subsequently issued, though bearing same date, were so numbered and contained such recitals as brought actual knowledge to the holders of such circumstances as were sufficient to charge them with knowledge of the fact of the issue after the act took effect and make them holders with notice in respect to claims of preference over said 'statutory claims.'"

Because the mortgage when made and recorded was notice to the world of a lien thereby created to secure $7,000 a mile on the bonds of said company on all its road then built and thereafter to be built, and that the bonds issued under it were numbered consecutively from one upwards and were equally secured by said first mortgage, and all in the same words and figures except the numbers; and the mortgage provides that they shall be of equal dignity and right, though issued at different times. The purchaser of such bonds is not put on inquiry as to when the bonds were actually issued, and there was no testimony tending to show that there was anything on the face of the bonds numbered from 280 upwards to

(Record, p. 509 to 533.)

And afterwards, to wit, on the 29th day of March, A. D. 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Texas, holding sessions at Galveston, in said State, and commencing on the first Monday in January, 1890, and ending on the 29th day of March, 1890, Hon. John W. Stayton, chief justice, and the Hons. R. R. Gaines and Jno. L. Henry, associate justices, present, a final judgment was rendered in said cause, and the following proceedings were had and entered of record, to wit:

Judgment of Supreme Court.

Fourth assignment.

S. K. McIlhenny, Adm'r, *et al.* *vs.* Jacob Binz *et al.* } No. 2849. Appeal from Harris County.

Opinion by Justice Gaines.

This cause came on to be heard on the transcript of the record, and the same having been inspected because it is the opinion of this court there was error in the judgment of the court below in awarding priority of payment over the mortgage debt to the claim of appellee Binz, consisting of three promissory notes, amounting at the date of the decree to the sum of $2,390.25, principal and interest, and in refusing priority to the claim of appellees Milby & Dow for the sum of $541.65, it is therefore adjudged, ordered, and decreed that said judgment be reversed; and the court here proceeding to render such judgment as should have been rendered by the court below, it is adjudged, ordered, and decreed that the said claim of appellee Binz for the sum of $2,390.25 be classed as a simple debt and paid *pro rata* with the general creditors, and that the claim of Milby & Dow for $541.65 be classed as a claim for operating expenses accruing before the receivership and be paid prior to the mortgage bonds, and that said judgment in all other respects be affirmed, and that the Houston East and West Texas Railway Company and its sureties, J. B. Chew and L. A. Bryan, pay all costs incurred by reason of its appeal; that the heirs of Mary Bremond, Pauline and John A. Dozier, Kate and J. C. Zimmer, Nettie and W. E. Lufkin, and Julia Bremond, and S. K. McIlhenny, administrator of Paul Bremond, deceased, pay all costs incurred by reason of their cross-appeals, said costs to be paid in due course of administration; that the Union Trust Company recover from the said appellee, Binz, one fiftieth of the costs of its appeal, and that the said Union Trust Company and its sureties, E. S. Jemison, J. M. Seymour, C. M. Fry, Walter Gresham, J. A. Baker, Jr., and J. H. B. House, pay all other costs in this behalf incurred, and that this decision be certified below for observance.

Opinion of Court.

Fourth assignment.

S. K. McIlhenny, Adm'r, and The Union Trust Co. *vs.* Jacob Binz *et als.* — No. 2849. Appeal from Harris County.

This suit was originally instituted by the Houston East & West Texas Railroad Company and Mary Louise Bremond, Edward L. Bremond, Harriet Tempson, John A. Dozier and his wife, Mary Pauline Dozier; Kate Bremond, Walter E. Lufkin and his wife, Henrietta C. Lufkin, and Julia Bremond, a minor, against T. W. House and other creditors of the company.

The petition alleges that the company was incorporated by an act of the Legislature of Texas approved March 11, 1875; that Paul Bremond had died shortly before the institution of the suit, being the owner of the whole — the stock, and that the co-plaintiffs of the corporation, except John A. Dozier and Walter E. Lufkin, were his devisees, legatees, and heirs-at-law. The petition also averred that the corporation was largely indebted, both to secured and unsecured creditors, and that it was unable to meet its obligations. It was further alleged that certain unsecured creditors had prosecuted their demands to judgment and had caused executions to issue thereon and to be levied upon the rolling stock of the company, and that such rolling stock was under mortgage to secure the outstanding bonds of the company and was necessary to enable it to operate its road and to perform its duties to the State and to the people. The prayer was for the appointment of a receiver to take charge of the assets of the corporation, and that upon final hearing its franchises and property be sold as an entirety, and that the proceeds of the sale be distributed among its creditors according to their respective rights, equities, and priorities, and the balance among the stockholders. At the time of the filing of the petition neither an executor of the will of Paul Bremond, deceased, nor an administrator of his estate had been appointed. The subsequent history of the suit is fully detailed in the brief of the appellant The Union Trust Company, and from that brief we make up the following summary of the proceedings:

The petition having been filed on the 7th of July, 1885, on the next day the court made an order appointing a receiver and directing that "all debts of said railway company for work and labor performed by its employés and laborers and for supplies and materials furnished for equipping, operating, repairing, or improving the road and all obligations incurred in the transportation of passengers and freights or of injuries to persons or property which have accrued within six months last past shall be paid out of the earnings of the road, as may be hereafter ordered." A special master in chancery was appointed in the same order, with the powers usually incident to that position. Soon after this original bill was filed the defend-

ants, Jacob Hornberger, Johnson & Hansen, Jacob Binz, and T. J. Todd, filed their answers to said original bill, setting up the company's indebtedness to them, all of which their pleadings show accrued after the date of the first mortgage and most of it after the date of the second mortgage, and claiming what they call an equitable lien on the company's property to secure their debts. These answers will be seen on pages 14 to 46 of the transcript.

Afterwards and before the Union Trust Company of New York became a party to the suit, by answer and cross-bill, most of the creditors of said railway company intervened in said suit, and their debts were referred to the special master, who very uniformly reported most of the claims as entitled to priority of payment.

On the 2nd day of December, 1887, the Union Trust Company, as trustee in the two mortgages intended to secure the bonds of the company, obtained leave of the court to make itself a party to the suit, and on the 5th day of March, 1888, filed its answer to the original bill, and also filed a cross-bill, seeking to foreclose the mortgages. To this cross-bill the railroad company filed an answer, attacking the validity of the mortgages. On the 26th of April, 1889, S. K. McIlhenny, as administrator of the estate of Paul Bremond, and the railway company filed a joint answer to the Union Trust Company's cross-bill, which, among other things, denied that the mortgages were issued in the manner authorized by law.

On October 7, 1889, the children and heirs of Paul Bremond, who were co-plaintiffs with said railway company in the original petition filed in this cause, and therein claimed that their father owned the entire capital stock of said company and the same had descended and passed to them as his devisees, legatees, and heirs-at-law, filed their amended petition, attacking said mortgages and denying that said railway company was ever organized; claimed that their father falsely and fraudulently assumed to have organized the company under said act and then spent in the construction of said road the community fund of himself and his deceased wife, and claimed one-half of said road through their deceased mother. They prayed for partition, and, in the event that relief could not be had, that the road be sold, and that one-half of the proceeds be paid to them. To this a demurrer was sustained.

On the 23rd of April, 1889, the special master made a report of all claims against the company which had been presented, including those of the Union Trust Company. At the fall term, 1889, of the court the cause came on for trial, and by consent was submitted to the court without a jury as to all the issues presented except the pleas of *non est factum* to the mortgages. The issues made by their pleas were tried before a jury, who returned a verdict in favor of the Union Trust Company. The court thereupon rendered a decree ordering a sale of the property of the company, including its franchises, as an entirety, and ranking certain of its debts into three classes, denominated respectively as "statutory claims," "operating expenses," and "construction claims," and directing that from the proceeds of the sale their claims so classified should be first paid; that then the mortgage bonds should be next paid, and that the

balance should be distributed among the general creditors. Such are the salient features of the decree. The details and other particulars need not be stated in this connection.

From the judgment the railroad company, S. K. McIlhenny, administrator, and the trust company have appealed. The heirs of Mary Bremond and Milby & Dow, intervening creditors, have filed cross-assignments of error, which are properly presented in briefs on file.

The appellant The Houston, East & West Texas Railway Company complains that the court erred in decreeing a foreclosure of the first mortgage and in decreeing a sale of the properties of the railway company to pay the bonds secured by that mortgage. It is insisted that so much of the decree is erroneous, "because by the terms of said mortgage it is provided that such foreclosure and sale can only be decreed in case default shall be made in the principal sum or sums by virtue of the said bonds or any of them or any part thereof at maturity," and no part of said bonds mature or become payable until the 1st day of May, A. D. (1898) eighteen hundred and ninety-eight.

The contention seems to be that since the mortgage was not subject to foreclosure for default in the payment of the interest on the bonds only, and since the principal was not due, the property of the corporation should have been sold subject to the mortgage. It may be that according to the terms of the mortgage the trustee was not entitled as an original proceeding to have a foreclosure and sale; but the cross-action of the Union Trust Company is not to be treated as such a proceeding. The railroad company first filed its bill alleging its inability to pay its debts and to operate its road, and prayed that it might be sold and its proceeds distributed among its creditors according to their respective priorities. Upon the propriety of such suit we are not called upon to pass. The only assignment in any of the numerous briefs on file which presents that question has been expressly abandoned; but we are unwilling to leave the subject without remark lest it should be inferred that the appointment of the receiver of the property of the corporation upon its own petition merits the approval of this court. The case of the Wabash, &c., Railway Co. *vs.* Central Trust Co., 22 Fed. Rep., 272, in a circuit court of the United States, is the only precedent we have found for this practice. On the other hand, there are authorities which hold that a receiver should not be appointed to take charge of the assets of a corporation upon its own original proceeding. (Kimball *vs.* Goodburn, 32 Mich., 10; Hugh *vs.* McCrae, Chase's Dec., 467.)

A natural person, because of his inability to meet the demands of his creditors, has no right to place his property under the control of a court of equity for the purpose merely of preventing its sacrifice by its sale under execution. We see no reason why, as a general rule, a corporation does not stand upon the same footing. If a railroad corporation become insolvent and a receivership be necessary for the preservation of its property and the distribution of its assets among its creditors it would seem that the directors, as trustees for

the stockholders and creditors, would be the proper parties to institute the suit.

But if the appointment of the receiver were erroneous we are of the opinion that the proceedings of the court consequent upon that appointment were not void, and that of all parties in interest in the subject-matter of the litigation the original plaintiffs have the least right to complain of the consequences of that action. We also think that since the report of the master and the evidence adduced upon the trial shows that the appellant railroad company was hopelessly insolvent it was not injured by the action of the court in foreclosing the mortgages. If any harm has resulted from the decree in this particular it has accrued to parties who do not here complain of that ruling. We might rest our decision upon the question presented by the assignment of error under consideration upon this ground alone; but we are of opinion that the court did not err in foreclosing the mortgages. The original petition alleged a state of facts which showed the company was unable to meet its obligations and operate its road, and the supplemental petition averred expressly its insolvency. When the trust company made itself a party to the suit the court had the entire property of the insolvent corporation in the hands of its receiver and all the creditors before it, and properly treated the assets as a trust fund for distribution among such creditors according to their respective priorities and liens. At that time default had been made in the payment of interest upon both the first and second mortgage bonds, and by the terms of the latter mortgage the bonds secured by it had become due. Under such circumstances we think it would have been anomalous to decree a sale of property of the company subject to the first mortgage, as this defendant contends should have been done. It may be that if the company had remained solvent under the stipulations in the first mortgage the trust company would have no right to a foreclosure, although default had been made in the payment of the interest on the bonds secured by it. The appellant railroad company also complains that the court erred in treating a pleading filed in the cause and styled an "amendment and supplemental" to the original petition as its pleading and in entering judgment *pro confesso* upon it. One of the grounds of objection to the action of the court is that the amended petition was not signed by the attorneys of the company. It is claimed that the attorneys who filed the pleading were the attorneys of the receiver and had ceased to represent the railroad company. We need not inquire into the propriety of the practice of permitting the attorneys of the plaintiffs in suit of this character to act at the same time as attorneys for the receiver. The name of one of the attorneys in the original petition was signed to the amendment. If the pleading was filed without the authority of the plaintiff company and if it desired to strike it out action should have been taken in the lower court to accomplish that end. The question of the authorities of the attorneys who signed and filed the pleading cannot be raised for the first time in this court. To rid itself of the pleading it was only necessary for the company to dismiss its original

counsel and to withdraw the amendment. There was no error in so much of the final decree as directed that the property of the insolvent corporation when offered to sale to the highest bidder should not be "knocked off" for a less sum than $1,200,000.00. We think the court had the power to make such an order, and that the power was properly exercised in order to prevent a sacrifice of the property. There is no reason why, after receiving enough cash to meet the expenses of the receivership, the costs of court, and of the foreclosure and the payment of such claims as had been awarded priority over the mortgage debts, the balance should not be paid in on the first-mortgage bonds.

During the progress of the trial and after the secretary of the railroad company had testified that a certain book identified by the witness was the book in which the records of the meetings of the directors and stockholders were kept, and that he found the book in the office when he became secretary, and that it was the only book that had been recognized as such, the Union Trust Company offered in evidence from that book what purported to be a record of the proceedings of the board of directors and of a meeting of the stockholders authorizing the execution of the bonds and of the first mortgage to secure the same. The railway company and McIlhenny, administrator, in support of their plea of *non est factum*, then proposed to prove by John Dozier the following facts: "In 1881 witness came into the company as its book-keeper and to do almost any work imposed on him. There was at that time no minute book of the company. He had knowledge of this. The witness *who* had theretofore, from 1875, been the clerk of the City Bank of Houston, and that the railroad had no clerk; he didn't know anything of it; that he then wrote up from scraps furnished him by Mr. Bremond, the president, and dictated to him the minutes which were found in the present purported minute book, and though they were dated, a great many of them, in 1875, 1876, and 1877, and on up to 1881, yet he in fact wrote them there himself from such memorandum and dictation as the president of the road, Mr. Bremond, furnished him, yet he is satisfied that there were no such meetings held or he would have known at the time they were held, and that he did not know of any such, though he was Bremond's son-in-law; that he does not know of but one genuine mortgage meeting which was held, and that was the one which provided for the call of the stockholders' meeting on December the 4th, 1884, and the stockholders' meeting held at the time, and which then sought to ratify the execution of the bonds and mortgages of the road; that this meeting was in fact held; that he believes and thinks he had an opportunity to know that what he believes, that the balance never in fact took place."

The trust company objected to the testimony, and it was excluded by the court. The ruling of the court was correct. When a corporation seeks to destroy the effect of entries upon its books which purport to be regular records of the proceedings of its board of directors or stockholders it should offer for that purpose testimony of a more conclusive nature than that which was offered

in this case. The testimony of the witness would have served merely to create a suspicion that there was an irregularity in the manner in which the records of the company were kept. If the evidence had been more conclusive in its nature and tendency it would have still been questionable whether, under the circumstances of this case, both the company itself and the administrator of Bremond should not be held estopped to deny the validity of the mortgages.

The execution of the first mortgage was proved *prima facie* by the evidence introduced by the trust company, and, there being no evidence to the contrary, the court did not err in instructing the jury to find for that company on the issue made by the plea of *non est factum*.

What has been said disposes of all the questions raised by the Houston, East & West Texas Railroad Company and of all the assignments presented by McIlhenny, administrator, except one. That assignment complains that the court erred in sustaining the demurrer of the trust company to a portion of the answer and cross-bill of the administrator of Paul Bremond's estate. We are not cited to the page in the transcript which contains the ruling complained of, and after a careful examination we are satisfied that the record does not contain the order.

In logical order the cross-assignment of error of the heirs of Mrs. Mary Bremond, the deceased wife of Paul Bremond, comes next for consideration. They are Pauline Dozier, wife of John A. Dozier; Kate Zimmer, wife of J. C. Zimmer; Nettie Lufkin, wife of Walter E. Lufkin, and Pauline Bremond, and they, in connection with others, were parties plaintiff in the original petition as heirs and legatees of Paul Bremond, deceased. At the term of the court at which the case was tried the parties named—the married women being joined by their husbands—filed an amended original petition in lieu of their original petition. For the purposes of this opinion the case made by their amended petition is sufficiently shown by the statement in the brief of the appellant trust company, which is as follows:

"These heirs allege that their father was possessed of a community estate, one-half of which they inherited through their mother after her death, but it is not alleged when she died. The petition is sworn to by Dozier, the husband of one of the heirs and the witness whose testimony was rejected, as per bill of exceptions of said heirs and the railway company, which was considered under the assignment of errors made by the railway company and Bremond's administrator, and alleges that the corporation was never organized under the act of incorporation, and that their father falsely and fraudulently assumed to have organized a company in pursuance of said act, and proceeded to survey and build the railroad so chartered. They aver and swear that all writing purporting to be minutes or accounts of said organization were false, forged, and mythical; that no certificate of stock was ever issued to any one, although in their original petition for a receiver they claimed as heirs of their father, who, they alleged, owned all the stock. They also allege that there never was any meeting of the stockholders, but that their

father conceived the purpose, and, intending to defraud them of their property and estate, converted the same to the building of said railway, falsely and fraudulently pretending that the same was being built, managed, and controlled by a company under an act of incorporation; that their father kept them in ignorance of what he was doing, and they believed from his representations that he was managing and controlling the estate belonging to them to the best advantage and for their interest, but that he concealed from them his actings, doings, and transactions and kept them in total ignorance of the same; that their father invested more than five hundred thousand dollars in said railroad.

"They sue for partition, alleging that said community fund built 120 miles of said road, and ask that the same be set off to them in partition, and, if not susceptible of partition, that it be sold and the proceeds given them." The cross-assignment of error is that "the court erred in sustaining the exceptions of M. G. Howe, receiver, to their amended original petition." We find an exception to the pleading purporting to be by "the Houston, East & West Texas Railroad Company, by M. G. Howe, receiver." The order complained of reads as follows: "Demurrer and motion to strike out all the pleadings of the heirs of Mary Bremond as made by the plaintiff The Houston, East & West Texas Railroad Company sustained and motion granted. Ruling excepted to by said heirs without prejudice to their rights in some appropriate proceeding." This clearly means that their amended petition was dismissed without prejudice. We think the court did not err in its ruling. The pleading states expressly that it is filed "in substitution and lieu of their original petition," and it had the effect of an abandonment by these parties of their original cause of action. Their original petition claimed as heirs and legatees of their father and the amended petition claimed adversely to their father and wholly as heirs of their mother. It *is* alleged a new and distinct cause of action and was properly treated as an original plea in intervention filed upon the eve of the trial. It sought to introduce into a suit already complicated new issues, and was well calculated to protract the litigation. Under such circumstances the court had at least the discretion, upon motion of any party, to strike out the petition, and there would have to be a very clear case of an abuse of that discretion for this court to hold that the ruling was error. The dismissal of the petition was without prejudice and their rights remain wholly unaffected by the result of this suit.

We will next consider the assignments of error presented by the Union Trust Company. The appellant first complains that the court erred in holding that its second mortgage does not embrace certain lands and town lots upon which a foreclosure was sought. The first mortgage was executed on the 1st day of May, 1878. On the 1st day of January, 1883, a second mortgage was executed. It conveyed all the property embraced in the first, and in addition thereto the income of the road, and also certain lands by the following description: "Seventy-five thousand acres of land or more, owned by said railway company and lying contiguous to said

trunk line and its authorized branches, the larger portion whereof being heavily timbered (which said lands are embraced in schedules thereof, marked Exhibit A and hereunto annexed as a part hereof), and such other lands as may be acquired by said railway company in east and northern Texas, in the section of country bordering on and adjacent to its trunk line and authorized branches, as will be shown by the records of the respective counties in which said lands may lie, save and except the blocks and lots designated and laid off in the town sites acquired and hereafter to be acquired." Attached to that mortgage is a schedule of the lands conveyed. Doubts have arisen as to the validity or construction of the instrument. On December 4th, 1884, the stockholders of the corporation in meeting authorized the execution of another mortgage to secure the same bonds. The resolution shows by its recitals that the main purpose of authorizing a new mortgage was to make a valid one to take the place of the former security on account of its doubtful validity.

It authorized a mortgage of the same property, except the lands, and it was probably intended that it should embrace in the main the same lands, though that purpose is not directly expressed. The description of the lands in the resolutions is as follows:

"Seventy-five thousand acres of land or more owned by said railway company and lying contiguous to said trunk line and its authorized branches, the larger portion whereof being heavily timbered, and also such as may be acquired by said company in any county through or into which said trunk line or any of its branches are now or may hereafter be constructed, and any and all land which said company may hereafter acquire in east and northeast Texas, in the section of country bordering on or adjacent to its trunk line and authorized branches, and also the blocks and lots laid off and designated in the town sites of said railway, and also the town lots situated in the city of Houston, Harris county, Texas, schedules of which lands and town lots and blocks are attached to the mortgage hereinafter set forth."

No schedule accompanies the resolution.

In the mortgage in question the same language is used as descriptive of the land conveyed, and "Schedule A" and "Schedule B" are referred to for a more particular description of the lands and town lots, respectively. It was shown, however, that at the time of its execution and delivery no schedules were attached. After this suit was instituted schedules were annexed to and recorded with the mortgage, but counsel for appellant attach no importance to that action, nor do they claim that the description in the mortgage is sufficient of itself. If the language had clearly shown that all the lands and town lots owned by the corporation in the localities named were intended to be included, they could have been identified by proof of the lands so owned, and the reference to the schedules should be treated as mere false description, which is harmless; but there are no words used indicating that all the lands or town lots of the company were to be embraced. On the contrary, the inference is that only such as shall be named in schedules attached

were to be included. We understand the specific contention of the appellant trust company to be that because the mortgage of 1884 was intended merely to cure the defects in that of 1883, therefore the description in the latter instrument should be aided by that in the former. It is evident, we think, that the leading purpose of the mortgage of December, 1884, was to make valid and effectual what was attempted to be done by that of January, 1883; but it is by no means clear that they were intended to cover precisely the same property. If such had been the intention it would have been appropriate and easy to have expressed such intention, both in the resolutions authorizing the later mortgage and in the mortgage itself; but there is no such expression, either in the resolutions or the mortgage. We think it evident that the intention in drawing the mortgage was that it should contain a complete and independent description of the property conveyed without reference to the former instrument, for which it was intended in the main as a substitute. It is probable that there had been some changes in the lands owned by the company; some may have been disposed of and others acquired; that they were not intended to cover precisely the same lands, and that on this account no reference was made in the later to the previous instrument for description. Whether such reference was purposely avoided or not, it is apparent that none exists. We think, therefore, the description in the one mortgage cannot be aided by that in the other. It results that, in our opinion, the court did not err in holding that the lands and town lots in question were not embraced by the second mortgage.

By its other assignments the trust company complain of the action of the court in allowing priority to certain creditors of the insolvent corporation over the bonds secured by the first and second mortgages. The debts of these creditors were ranked, as before stated, in three classes: 1, "Statutory claims"; 2, "operating expenses," and 3, "construction claims." For convenience in determining the question involved we will first consider the construction claim. There were certain debts incurred by the receiver in constructing new road under the orders of the court. There is no objection urged to giving these claims priority. It is, however, insisted that the court erred in allowing priority to certain debts incurred by the company in constructing new road before the receiver was appointed.

Though the doctrine is of recent origin, it has become settled law in this country that in the final distribution of the assets of an insolvent railroad corporation which has been placed in the hands of a receiver there are certain claims against the fund which, under certain circumstances, are entitled to priority of payment over the debts of the corporation secured by mortgage upon its property. (Railroad Co. *vs.* Cowdrey, 2 Wall., 459; Fosdick *vs.* Schall, 99 U. S., 235; Hale *v.* Frost, 99 U. S., 389; Miltenburg *v.* Railway Co., 106 U. S., 286.) The expenses of operating the railroad while in the hands of the receiver have been uniformly allowed, and it would seem that as to claims

of this class there should never have been any serious difficulty. Being the expenses of administering the trust fund, they should be a first charge upon its funds, and should be awarded priority of payment. The cases cited also show that debts incurred by the company in operating its road, including necessary repairs and "useful improvements," within a limited time before the appointment of a receiver, have, at least as to the current earnings, been allowed a preference in payment over the bonded debts secured by mortgage upon its property; and when the earnings have been diverted to the payment of interest upon the bonds and in making betterments upon the property the holders of these claims have been reimbursed from the proceeds of the sale of the railroad.

The reasons assigned for this doctrine are not the same in each of the cases. In Fosdick *vs.* Schall, *supra*, the proposition was laid down that "when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement as may, under the circumstances of the particular case, appear reasonable," and "that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which but for the division of funds would have been paid in the ordinary course of business." The opinion in this case was by Chief Justice Waite and was concurred in by the whole court. In Hale *vs.* Frost, *supra*, the Supreme Court, upon a certificate that the judges below were opposed in opinions, expressly affirmed the proposition "that the net earnings of the road while in possession of the court and operated by the receiver are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the chancellor in the payment of claims which have superior equities, if such be found to exist;" and in Burnham *vs.* Bowen, 111 U. S., 777, the court say: "Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the increase. * * * Such being the case, when the court of chancery, in enforcing the the right of mortgage creditors, takes possession of a mortgaged railroad, and thus deprives the company of the right to receive any further earnings, it ought to do what the company would have been bound to do if it had remained in possession—that is to say, pay out from what it receives of the earnings all debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed debts of the income shall be paid from the income before it

is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity under such circumstances as a 'going concern,' not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it." Such are the various principles announced in support of the modern doctrine that in the settlement and distribution of the assets of an insolvent railroad company which has been placed in the hands of a receiver priority of payment should be allowed to certain claims over the mortgage debts.

The principle of implied consent laid down in Fosdick *v.* Schall, *supra*, seems to have been disregarded in the case of The Union Trust Co. *v.* Illinois, etc., Co., 117 U. S., 434, in which the receiver was not appointed at the instance either of bondholders or of their trustee; but the doctrine is still maintained that creditors who have labored, furnished supplies, made repairs or usual improvements in the operation, maintenance, and betterment of the railroad, and who have been suddenly deprived of their remedies at law by the appointment of a receiver, are entitled to the equitable consideration of the court in the distribution of the assets of the company and to priority in payment from the net income of the property while in the hands of the court.

As to what is commonly known as operating expenses there is no difficulty; and so much is conceded in this case. The claims we now have under consideration are for construction of new road before the receiver was appointed and for material furnished for such construction. They accrued within six months before the appointment. It has been held that claims for construction, unless the work was done or the material furnished in pursuance of an order of the court, cannot be allowed priority. We may concede that as a general rule this is correct; but we think there may be construction claims which appeal as strongly to the conscience of a court of equity as the debts which are commonly known as operating expenses; and we further think we have such claims in those now under consideration.

At the time the first mortgage was executed the railroad was but an inchoate enterprise. The face of that mortgage shows that but a few miles had been completed, and that it was contemplated between the company and the mortgagees that the construction was to continue and that the bonds secured by the mortgage should issue as the road progressed. The second mortgage also shows upon its face that the construction of the road was to continue. The mortgages covered not only the road which was completed at the time they were executed, but also that which was to be subsequently constructed. While the construction was still progressing the receiver was appointed and the holders of these claims deprived of their ordinary remedies for the collection of these debts. From the operation of the road the receiver made net earnings amounting to $270,721.44, a sum more than sufficient to pay these claims and all others to which priority was allowed. This money was expended under the orders of the court in paying interest on the bonds and

in making valuable and permanent improvement upon the property subject to the mortgages.

The question here is as to the right of priority of payment out of the net earnings of the road while under control of the court. The opinion in Fosdick *v.* Schall, *supra*, recognizes the debts incurred for "useful improvement" have, as to the net income, a preference over the mortgage debts. We understand the terms "useful improvements" to include not only necessary repairs, but also changes in and additions to structures already completed as may be deemed advantageous to the road in a financial point of view and such as prudent management would demand. Such we would think would be debts created in substituting an iron and stone bridge for one made of wood. Such would be the expenses of a change from a narrow gauge to a standard gauge when the exigencies of the traffic or other circumstances are such as to demand that change in order to prevent the utter failure of the enterprise and to keep up the railroad as "a going concern." Ordinarily when mortgages are issued upon completed roads it is not contemplated that its income is to be applied to the construction of new road. In such cases debts incurred for such new construction ought to have no claim against the bondholders, either as to the *corpus* or the increase of the property; but when mortgages are executed upon an unfinished road and they show upon their face that it was contemplated that the work of construction should be prosecuted to completion, and when the mortgages attach to the new road as fast as it is finished, we are of opinion that the new road should be considered a "useful improvement," and that if the road be put into the hands of a receiver before the work and materials are paid for the holders of the claims for such work and material should be paid from the net income of the road while under control of the court if there be any.

The claims now under consideration accrued within six months before the appointment of a receiver, and the holders, being guilty of no laches, were prevented by the action of the court from subjecting the property to the payment of their debts through the courts of law. We think, therefore, it was the duty of the court to protect them in its final decree if there was on hand a fund which could be applied to the payment of their debts.

The net earnings of the road were not on hand at the time of the trial, but had been expended by order of the court in paying interest on the bonded debt and in improvements upon the property subject to the mortgage, which enhanced its value to the full amount so expended upon it. In reference to the earnings of the road counsel for this appellant expressly concede "that the mortgagees' rights thereto as against common creditors did not attach until the trustee in the mortgages took possession in person or by agent or by a receiver appointed at their instance." Their concession is the result of a well-established line of decisions in the highest court of the country. (Galveston R. R. Co. *v.* Cowdrey, 11 Wall., 459; Gilman *v.* Telegraph Co., 91 U. S., 603; Bridge Co. *v.* Heidelback, 94 U. S., 798; Fosdick *v.* Schall, *supra.*) They insist, however, that since they were not parties to the suit when the court ordered the funds to be

applied to the several purposes mentioned, and since they cannot be considered as having consented to such application, the appropriation to the payment of interest and of improvements upon the road is not to be considered such a diversion as "would require them to be reimbursed either by the mortgages or out of the *corpus* of the property." We do not understand that the right of creditors having an equitable claim upon the net earnings of an insolvent railroad to be reimbursed, when these earnings have been diverted to another purpose, depends upon the consent of any party. The principle is not that the mortgage creditors are responsible for the diversion, but that the diversion was in derogation of the rights of those entitled to the fund, and that therefore the money should be restored. The bondholders have received the entire benefit of the diversion in this case, either directly in money or indirectly in the enhancement of the value of the property subject to their mortgages; and, if they have no superior right to the net earnings, it follows that they have no right to complain of the action of the court in restoring that fund from the proceeds of the sale of the mortgaged property.

We have found no case in which preference to claims for work done and material used in construction of new road have been given a preference over the debts secured by mortgage. On the other hand, there are several cases in which such preference has been denied; but we think each of these cases differ in some important particular from this. In Hale *v.* Frost, 99 U. S., 384, a claim for construction material was denied priority. The report of the case is meagre, but it would seem from a remark in the opinion in Williamson *v.* R. R. Co., 33 Gratt., 631, "that this material was used in the construction of an independent branch road." In Porter *v.* The Bessemer Steel Co., 120 U. S., 649, and Hand *v.* R. R. Co., 17 So. Ca., 219, the effort was to charge the construction claims upon the railroad itself in preference to the mortgage debts. It does not appear that in either case that there was any net income from the operation of the road while in the hands of the court. From the report of the case of Addison *v.* Lewis, 75 Va., 701, it does not appear that there was any net income to the credit of the cause or that had been diverted. The petition of intervenor simply showed that their claim was due them as contractors in building an extension of the railroad without an averment, so far as the opinion shows, of any other circumstance entitling them to equitable consideration.

It follows that we are of opinion that the court did not err in awarding the priority to the construction claims.

The appellant trust company also insists that the court erred in giving priority to the class of claims designated as claims having "statutory liens." The court found that the holders of these claims were secured by a lien upon the railroad and its equipments by virtue of the act of February 18th, 1879. (Sayles An. St., art. 3179*a* and note.) The first mortgage was executed before the passage of this act, and it is urged that by reason of this fact the act is inoperative as against the bonds secured by that mortgage. The argument is that the act as applied to the holders of obligations secured by mortgages existing on the railroad at the time the act

took effect is in derogation of the constitution of the State and that of the United States and is therefore void. We doubt whether this position can be successfully maintained (Provident Institution *v.* Jersey City, 113 U. S., 506), but we do not deem it necessary to decide the question. The special master found that all these debts were due for labor performed in the construction, operation, and maintenance of the railroad within twelve months before the appointment of the receiver. The report in this respect was not contested. The claims are therefore of a character as to entitle them to priority of payment out of the net earnings of the property in the hands of the receiver unless priority should be denied them by reason of the fact that they did not accrue within the six months next preceding the receiver's appointment. When a court appoints a receiver of the property of a railroad company and makes an order directing him to pay claims of its operatives for services rendered prior to the appointment it would seem proper to prescribe a period of time within which the debts to be so paid should have accrued; but we think such an order should be only provisional, and that it could not properly be held conclusive against any one not a party to the suit at the time the order was made. In this case the court, in accordance with the more general practice, fixed that limit as to time at six months before the receiver's appointment. Such a limit is purely arbitrary, but as long as it is simply provisional it is proper. The court seems to have been of opinion that the time fixed in the order of appointment should govern throughout the case. The rule laid down by the court is that the holders of claims for operating expenses have a right to the current means superior to that of the mortgage creditors, and that it continues until it is lost by such delay in the prosecution of their claims as should be deemed sufficient to bar their equity. The period of time necessary for this purpose depends upon the circumstances of each particular case. That the period and the right are not dependent upon the implied consent of the bondholders to the order of the court which appoints the receiver and directs the payment of claims of certain classes which have accrued within a fixed period of time prior to the order is shown by the case of The Union Trust Co. *v.* Illinois, etc., Co., 117 U. S., 374, in which the mortgagees were not parties to the suit at the time the receiver was appointed and the order was made. The limitation not longer than six months has been the rule in the trial courts, but in the Supreme Court of the United States claims have been allowed which accrued from a much longer period before the receiver's appointment. In Hale *v.* Frost, *supra*, the claim of Hale, Ayer & Co., which was allowed priority, was for supplies to the machinery department furnished nearly two years before the receiver took possession. In Burnham *v.* Bowen, *supra*, it did not appear that the debt accrued within six months before the appointment. In the following cases also that limit appears to have been disregarded: Douglass *v.* Clem, 12 Bush., 608; Williamson *v.* Railroad Co., 33 Gratt., 624; Skiddy *v.* Railroad Co., 3 Hughes, 320; Atkins *v.* Railroad Company, *id.*, 307.

In Blair *v.* Railroad Co., 17 A. & E. R. R. Cases, 337, the court

recognized liens accruing under the statutes of Missouri and gave to similar claims from other States when there was no statute allowing such liens an equal dignity. If it was meant to place them upon the same footing merely as to the time of their accrual the principle would seem sound. Equity follows the law, and if there be no law directly applicable it will follow the analogy of the law. The creditors whose claims are now under consideration had a lien given by law upon the railroad and its equipments. Let it be conceded that it was subsidiary to the mortgages; they nevertheless had a lien as against the railroad company and a right to enforce it against the equity of redemption in the property. The twelve months during which that right continued to exist had not elapsed when the court took control of the assets of the company. We are of opinion that they should not be held guilty of laches in prosecuting their claims until their liens were lost by delay, and that the mere lapse of more than six months between the time in which the claim accrued and the appointment of a receiver does not afford a sufficient reason for denying a priority to which they would otherwise be entitled.

To some of these claims there are more specific objections. It is urged that the claims embraced in Exhibit B of the master's report were not for labor furnished upon the railroad. The report of the master is that "Exhibit B is a list of claims for board alleged to have been furnished either by intervenors or by others, and the claims therefor assigned to intervenors, to mechanics, laborers, and operatives employed by said railroad company in the construction, maintenance, and operation of its railroad or its equipments." It appears that it was the understanding between the company, the laborers, and the boarding-house keepers that the company should retain a sufficient amount of the wages of the laborers to pay their board, and that the wages so retained should be paid to the keepers of the boarding-house in discharge of the board. In contemplation of law the transaction is the same as if the laborers, after the wages were due, had in settlement of their board given orders upon the company for an amount sufficient to pay it, and the company had accepted them. In equity, at least, it is a valid assignment of the debts due for wages.

So, also, there was an arrangement between the company, the laborers, the boarding-house keepers, and the grocers, who furnished supplies to the latter, to the effect that of the money retained from the wages of the laborers for the benefit of the boarding-house keepers the company should hold and pay to the grocers an amount sufficient to discharge these claims for the supplies so furnished. In pursuance of these agreements the company credited the boarding-house keepers with the wages of the laborers retained, and also credited the grocers with the amounts of their bills. The claims so accruing in the hands of the boarding-house keepers and in the hands of the grocers were properly treated as claims originally due laborers, etc., and duly assigned to the holders. That a right to priority attaching to a claim of this character is not destroyed by assignment is settled by the cases of Burnham *v.* Bown, 111 U. S.,

777, and Union Trust Co. *v.* Walker, 107 U. S., 596. This court has held that where a vendor sells land upon a credit and the vendee executes a note for the purchase-money, payable to a third party, the payee has a lien upon the land for its payment. (Pinchau *v.* Collard, 13 Texas, 333.) If the lien of the vendor passes to the payee in that case, we see no reason why the principle should not apply to these claims. In some instances where a number of these debts due for wages had become the property of one person the company gave the assignee a promissory note for the aggregate amount. This merely changed the evidence of the indebtedness and did not change the character of the debts.

Appellee Jacob Binz was the holder of many of these claims, for some of which he took the notes of the company endorsed by Paul Bremond. It is insisted that this was a waiver of his lien, if any he had. The claim for priority is held not to be a lien, and hence the law of liens is not applicable. But the special master found in relation to these claims, as a matter of fact, that in taking the endorsement there was no intention to waive a lien against the company. In this State we hold, as to vendors' liens at least, that the taking of an independent security of any character is *prima facie* a waiver of lien, but that in every case it is a matter of intention to be determined by the evidence.

It is also assigned that the court erred in giving priority to the claim of the Dixon Manufacturing Company. It is not objected that these claims were not for operating expenses, and as originally incurred would not have been payable under the court's order made when it appointed the receiver. The objection is that the claim consisted in part of two promissory notes made by the company and endorsed by Bremond. The special master found that there was no intention to waive any lien in taking Bremond's endorsement. What we have previously said is sufficient to dispose of this question.

The appellant The Union Trust Company also complains that the court erred in adjudging that a claim of appellee Binz, consisting of three promissory notes which purported to be secured by a pledge of three-fourths of the gross earnings of the railroad, *were* "entitled to priority *pari passu* with the claims for operating expenses." These notes were given for money borrowed to pay interest on the bonds, and each contained a stipulation as follows: "Three-fourths of the gross earnings of the road from date *is* pledged in liquidation of this note." We are unable to see how a mere stipulation of this character can have any legal effect. If the company had placed the road in the hands of the payee or of some third person, to be operated until from three-fourths of the gross income the notes would have been paid, the contract, except as to the rights of third parties, would have been valid; so, also, perhaps, if it had been made the duty of some one who had accepted the trust to receive and apply the income. In Jones on Liens it is said that "the rule that an equitable assignment can be effected only by a surrender of control over the funds or property assigned is one that is strictly held to. A mere promise that the goods shall be held in

trust for the benefit of another, and that the proceeds shall be paid to him, does not amount to an equitable assignment of the goods or a specific lien upon them, for in such case the owner retains control of the goods and may appropriate them or their proceeds to the payment of other creditors, and the holder of such promise cannot follow the goods any more than he can follow the proceeds. He has no lien either upon the goods or their proceeds. The owner has violated his promise, and for this he is personally responsible." The text is supported by the case cited (Gibson *v.* Stone, 43 Barb., 285). A mortgage upon a stock of goods, with a right expressly or impliedly reserved to the mortgager to remain in possession and to continue to to sell them in ordinary course of trade, is void, if for no other reason, because the reservation of the right to sell is inconsistent with the idea of a lien. Moreover, if a mortgagee's right to the net earnings of a railroad is not effectual until he takes possession, either by himself or through a receiver, in pursuance of the terms of the mortgage, as was held in Gillinan *v.* Telegraph Co., *supra*, we do not see how the appellee Binz has acquired any claim upon the gross earnings in this case. We think the court erred in giving these claims priority over the bonded debt. This disposes of all of the assignments of error presented by brief, except that of appellee Milby & Dow. They intervened for the establishment of two claims against the railroad company, which were for coal furnished for the purpose of operating its road. One accrued in December, 1884, and the other in January, 1885—the one a little more and the other a little less than six months prior to the appointment of the receiver. Priority in payment was allowed to the junior claim, but was denied to the older. We see no sufficient reason for the distinction, and it seems to us arbitrary. There was no circumstance disclosed by the report of the master or the evidence upon the trial to show laches as to the one claim more than as to the other. In the case of Burnham *v.* Bowen, *supra*, priority was allowed to a claim for the price of coal furnished to the railroad company, although it did not appear that the claim accrued within six months before the receiver's appointment. It is evident from the opinion that the period of six months was treated as a matter of no importance. We think the court should have held both the claims of these appellees as entitled to payment prior to the mortgage bonds.

So much of the decree of the lower court as awards priority of payment over the mortgage debt to the claims of appellee Binz, consisting of three promissory notes and amounting at the date of the decree to the sum of $2,390.25, principle and interest, and so much of the decree as refuses such priorty to the claim of appellees Milby and Dow for $541.65 is reversed, and a decree will be here rendered directing that the said claim of appellee Binz be classed and paid *pro rata* with the general creditors, and that the claim of Milby and Dow be classed and paid prior to the mortgage bonds. In all other respects the judgment is affirmed.

The Houston East & West Texas Railway Company will pay all costs of its appeal. The heirs of Mary Bremond and S. K. McIlhenny, administrator of Paul Bremond, will pay all costs in-

curred by reason of their cross-appeals. The Union Trust Company will recover of appellee Binz one-fiftieth of the costs of its appeal and will be adjudged to pay all other costs by it incurred.

R. R. GAINES,
Associate Justice.

Filed March 29, 1890.

(Record, p. 533 to 536.)

And on the 27th day of May, 1890, there was filed in the office of the clerk of the supreme court of the State of Texas, at Galveston, a petition for the allowance of a writ of error returnable to the Supreme Court of the United States, and for a citation, which, with the endorsements thereon, is in words and figures following, to wit:

In Supreme Court of Texas, at Galveston.

S. K. McIlhenny and Union Trust Company of New York, Appellants, *vs.* Jacob Binz *et als.*, Appellees.	No. 2849. Fourth Ass't.

Petition for Writ of Error.

To the Honorable John W. Stayton, chief justice of the supreme court of the State of Texas:

Now comes the Union Trust Company of New York and complains that in the record and proceeding and also in the rendition of a judgment and decree in a suit between S. K. McIlhenny, administrator *cum testamento annexo* of the estate of Paul Bremond, dec'd, and the Union Trust Company of New York, trustee, appellants, and the Houston, East & West Texas Railway Company, Jacob Binz, Mary L. Bremond, James Appleby, Harriet Appleby, John A. Dozier, Mary P. Dozier, J. C. Zimmer, Kate Zimmer, Walter E. Lufkin, Henrietta C. Lufkin, Julia Bremond, S. M. McAshan, S. Abrams, John Achenback, S. Alexander & Co., First National Bank, Anderson, Temby & Co., Sam. Allen, R. B. Baer, W. R. Baker, Merchants' and Planters' National Bank of Texas, Barry & Co., Joe Barker, J. B. Bell, Benearl Better, A. H. Belo & Co., Dan. Bergin, S. Bergman, F. D. Bishop, A. M. Bland, Leon & H. Blum, W. P. Bower, Tom Boyles, Calvin Bower, Jim Brandt, J. J. Burroughs, G. M. Bynum, J. J. Cameron, Carson, Sewall & Co., Casey, Ogden & Parker, Geo. Caywood, D. S. Chandler, W. A. Childress, Adam Clay, John Clay, R. A. Clifford, O. L. Cochran, F. Comminge, Martin Corbett, Pat. Corrigan, F. F. Collins, John Collins, Miles Courtney, W. H. Coyle, A. Cramer, W. H. Crank, W. H. Crawford, Frank Colley, F. F. Chew, H. M. Curtin, Denis Crowley, Pat. Crowley, John Cunningham, J. Dargereu, Davidson & Stephen, A. Davidson & Bro., C. H. Davidson, Alex. Davis, T. R. Ray, Frank Dunn, Dickson Manufacturing Co., Joe Edmundson, Electric Light & Power Co., R. & T. A. Ennis, Epperson & McCardle, J. A. Ewing & Co., Fairbanks & Co., S. A. Fears *et al.*, Jno. Flannagan, N. Fletcher, Peter Floeck, Flour Mills Co., Jno. Foley, Wm.

Ford, James Foster, H'y S. Fox, Fred. Emme, Wm. Furguson, Freemen & Leggett, Jno. Fromme, G. B. Garrison, C. J. Garlick & Bro., James Gillen, J. Y. Gillespie, Girardeau, Young & Co., S. L. Gohlman, O. H. K. Goff, G. Goyen, James Grady, Green & Nicholson, A. S. Hall, L. F. Hall, W. J. Hancock, J. L. & F. Hanson, F. W. Harlocher, I. Heidenheimer, J. L. Henderson & Co., J. J. Hemming & Co., M. Hennessy & Co., James Highland, F. P. Hill, J. C. Hill, Hooks Smelting Co., Jacob Hornberger, H. C. House, W. H. Howard, A. R. Hudnall, R. Houston, W. Q. Harding, T. W. House, I. Japhet, W. C. Jefferson, Jersey City Iron Works Co., Charles Johnson, C. W. Johnson, A. N. Johnson, Johnson & Hansen, F. L. Johnson, L. M. Jones & Co., Kanim & Rostenbach, Jno. P. Kale, H. T. Keller, Chris. Keil, H. & T. Keller, Theodore Keller, John Kelly, Pat. Kelly, Wm. Kelly, D. E. Kennedy, John Kennedy, J. Kerr & Co., J. Kennedy, P. T. Kennedy, A. M. Kleiber, I. Kottwitz, Julia King, G. H. Lane & Co., L. J. Latham, Ellen Lawler, Emil Levy, M. Lorraine, R. S. Lovett, C. Lucia, Litchfield Car Co., Kate E. Maher, Ed. Mahoney, M. V. Mangum, Meyer, Kahn & Frieberg, G. H. Mather, Jno. Mellinger, Meyer & Schmidt, J. F. Meyer, Milby & Dow, J. J. Millard, Chas. Miller, B. E. Moore, Thos. Moore, A. Mosier, Thos. Murphy, P. H. Murray, J. R. Morris, R. B. Morris, administrator; Thos. McAnallyn, J. D. McCall, Davis McArdle, McGowan Pump Co., A. McGowan, Neil McDonald, McIlhenny Company, S. A. McKenzie, S. K. McIlhenny, N. M. McManus, John McMasters, Narrow Gauge Desp. Co., T. Nolan, Jno. Noblett, C. A. Noblett, H. F. Northrup, Andy O'Rourk, G. W. Parnell, W. G. Parker, E. M. Palmer, J. J. Pastoriza, J. T. Plencher, W. A. Polk, G. L. Porter, Post Publishing Company, R. W. Powell, M. Prewitt, Francis Pierce, Rose Quigley, James Quinn, W. F. Ruby, F. Rohde, M. Roberts, A. T. Robinson, J. W. Robinson, T. S. Ross, M. B. Richardson & Co., Ricke & Williams, Max Roy, Wm. Ruperberg, J. W. Ryan, M. Ryan, J. W. Sam, W. Schelobohn, W. G. Sears, C. P. Shearn, F. T. Shepherd, M. Shotwell, James Singleton, J. S. Snedeker, A. J. Spradley, J. W. Squire, Frank Sterne, Sam. Sterne, J. P. Straughan, J. H. Summers, Sweeney & Coombs, St. Louis R. R. & M. S. Co., Styrat & Boyles, D. F. Stuart, receiver; E. B. Smith, Robert Smith, Ellen Schwing, S. C. Schindler, E. E. Tautenhahn, H. Tautenhahn, T. J. Todd, Jno. Tompfhorde, E. P. Turner, Texas Lamp & Oil Co., Texas Railway, Mill & Supply Co., Tudor Iron Works Co., Wall and Noland, J. L. Walsh, Chris. Warner, G. W. Warner, S. S. Walson, J. F. Week, M. Weinberg, M. C. Wellbourn, A. C. White, Hank White, White G. Lub. Co., Ed. Whitaker, Chas. Whiting, H. Williams, P. J. Willis & Co., Wiggins & Simpson, C. J. Wright, Ed. Young, J. N. Young, J. C. Chew, Good, Root & Co., J. W. Johnson, St. Charles Car Co., S. M. Swenson, and Houston and Texas Central Railway Company, appellees, in the supreme court of the State of Texas, numbered 2849, 4th assignment, upon the docket of said supreme court, being the highest court of law and equity of said State in which a decision could be had in said suit, which judgment or decree was rendered on the 29th day of March, 1890, and wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the

Constitution of the United States, and the decision of said State court was in favor of such the validity of said statute, all of which appears in the record and proceedings in said suit, a manifest error hath happened, to the great damage of the Union Trust Company.

In consideration of the premises the said Union Trust Company prays for the allowance of a writ of error to operate as a supersedeas and for such other process as may cause the said judgment or decree to be reviewed and corrected by the Supreme Court of the United States.

W. H. PECKHAM,
BAKER, BOTTS & BAKER, AND
GRESHAM & JONES,
Att'ys for Union Trust Company.

Allowed by—

JOHN W. STAYTON,
Chief Justice of Supreme Court of Texas.

Having been requested by the Union Trust Company to join in the application for writ of error, I have and now do decline to join in such application.

S. K. McILHENNY, *Adm'r*,
By HUTCHESON, CARRINGTON & SEERS.

Filed May 27, 1890.

D. D. ATCHISON,
Cl'k Sup. C't Texas.

* * * * * * *

(Record, p. 555 to 558.)

Assignment of Errors.

THE UNION TRUST COMPANY, Trustee, Plaintiff in Error,
v.
JACOB BINZ *et als.*, Defendants in Error.

In Error to the Supreme Court of the United States from the Supreme Court of Texas. October Term, 1890.

The plaintiff in error in the above cause, The Union Trust Company, complains of the decree of the supreme court of Texas affirming the decree of the Harris county district court, and assigns the following errors in said cause for the consideration of the Supreme Court of the United States:

I.

The facts disclosed by the record show that the railway company's first mortgage on its railway and appurtenances was executed the first day of May, 1878, and that the act of the Legislature of the State of Texas entitled "An act to protect mechanics, laborers, and operatives on railroads against the failure of owners, contractors, and sub-contractors or agents to pay their wages when due and provide

a lien for such wages," was passed February 18th, 1879, and the supreme court of Texas erred to the prejudice of the plaintiff in error in adjudging and directing that the decree rendered by the Harris county district court adjudging the several claims designated and classified in the record of this cause as statutory claims—that is to say, the claim of the First National Bank for $1,720.04; the two claims of Jacob Binz for $18,495.38 and $3,157.80, respectively; the claim of A. Blau for $1,543.08; the claim of J. J. Burroughs for $853.28; the claim of Pat. Corrigan for $946.89; the claim of G. B. Garrison for $1,123.20; the claim of J. J. Hemming & Co. for $3,476.58; the two claims of Jacob Hornberger for $7,097.36 and $2,936.51, respectively; the claim of H. & T. Keller for $1,257.81; the claim of Theodore Keller for $1,276.60; the claim of William Kelly for $1,080.65; the claim of Kate E. Maher for $919.45; the claim of John Mellinger for $1,065.95; the claim of Meyer & Schmidt for $853.84; the claim of S. A. McKenzie for $620.42; the claim of J. M. Pruitt for $1,980.00; the claim of F. Rhode for $2,162.82; the claim of J. W. Sam for $1,940.30; the claim of M. Shotwell for $832.65; the claim of A. J. Spradely for $1,120.48; the claim of Sam. Sterne for $1,180.50, and the divers other claims classified and designated in the said record as statutory claims entitled to priority of lien upon or right of payment out of the proceeds of the sale of the railway company's road and appurtenances over said first mortgage should be affirmed, and in adjudging costs in favor of said defendants in error against the plaintiff in error, because this was impairing the obligation of the first-mortgage contract, in violation of section 10, article 1, of the Constitution of the United States, and is depriving a person of his property without due process of law, in violation of section 1, article 14, of the Constitution of the United States.

II.

The supreme court of Texas erred to the prejudice of the plaintiff in error in adjudging and directing that the decree rendered by the Harris county district court adjudging the several claims for construction of new road constructed before the appointment of a receiver in this cause, designated and classified in the record as "Construction claims," entitled to payment before the second-mortgage claims out of the earnings acquired after the receiver was appointed, and therefore as having priority over the second mortgage—that is to say, the claim of Sam. Allen for $792.78; the claim of E. M. Brown for $942.84; the claim of Bryan & Bro. for $694.70; the claim of W. H. Crank for $1,844.62; the claim of the Dixon Manufacturing Company for $13,824.00; the claim of J. A. Ewing & Co. for $1,480.90; the claim of J. Heidenheimer for $1,076.90; the claim of Jacob Hornberger for 4,605.05; the claim of T. W. House for $1,543.50; the claim of Johnson & Hansen for $57,441.58; the claim of F. L. Johnson for $2,309.00; the claim of John Mellinger for $7,812.00; the claim of Meyer & Schmidt for $1,270.46; the claim of Neil McDonald for $20,954.62; the claim of C. A. Noblett for $773.25; the claim of T. J. Todd for $10,823.40; the claim of P.

J. Willis & Co. for $740.32, and the divers other claims classified and designated in the record as "construction claims," should be affirmed, and in adjudging costs in favor of said defendants in error against the plaintiff in error, for the reason that the second mortgage, executed December 19, 1884, before these claims or any or either of them arose, conveyed the earnings of the road and the mortgagee was entitled to those earnings acquired after the appointment of the receiver, subject only to operating expenses and necessary repairs, and to allow the said claims for construction of new road a preference over the second mortgage was to impair the obligation of the second-mortgage contract, in violation of section 10 of article 1 of the Constitution of the United States, and is to deprive a person of his property without due process of law, in violation of section 1 of article 14 of the same Constitution.

Wherefore the plaintiff in error, the said Union Trust Company, prays the Supreme Court of the United States to reverse the said decree of the supreme court of Texas, and to direct the said court to reverse the decree of the Harris county district court, with instructions to grant the relief prayed for by the plaintiff in error.

W. H. PECKHAM,
BAKER, BOTTS & BAKER, AND
GRESHAM & JONES,
Att'ys and Counselors for Union Trust Company, Plaintiff in Error.

* * * * * * *

Supreme Court of the United States.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing manuscript pages, numbered from one to sixty-three, inclusive, contain true extracts from the transcript of the record in the case of The Union Trust Company of New York, trustee, plaintiff in error, *vs.* Jacob Binz, The Houston, East and West Texas Railway Company, *et al.*, No. 1333, October term, 1890, as the same remains upon the files of said Supreme Court.

Seal of the Supreme Court of the United States.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this 20th day of October, A. D. 1890.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Office Supreme Court, U. S.
FILED,
OCT 23 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1890. No. 1333.

THE UNION TRUST COMPANY OF NEW YORK,
Trustee, Plaintiff in Error,

vs.

JACOB BINZ, THE HOUSTON EAST AND WEST TEXAS RAILWAY COMPANY, et al.,
Defendants.

In Error to the Supreme Court of the State of Texas

Motion to Dismiss or Affirm and Brief.

A. W. HOUSTON,
For Johnson & Hansen, Defendants.

McGILL & WALLACE
PRINTERS,
1107 E STREET N. W.

IN THE

Supreme Court of the United States.

No. 1333.

UNION TRUST COMPANY OF NEW YORK, Plaintiff in Error,

vs.

JACOB BINZ, *et al.*, Defendants in Error.

WRIT OF ERROR TO SUPREME COURT OF THE STATE OF TEXAS.

Now come Johnson & Hansen, defendants in error, and show to the Honorable Supreme Court of the United States upon the face of the record herein.

First. There was no federal question raised in and decided by the Supreme Court of Texas in this cause, and this Honorable Court has no jurisdiction to review the opinion and decree of said State Supreme Court.

Second. As to these defendants in error and their claim and right decided by the Supreme Court of Texas no federal question was either raised, discussed or decided in said State Supreme Court, and this Honorable Court has no jurisdiction to review the opinion and decree of said State Supreme Court as to them, the said Johnson & Hansen.

Third. Said want of jurisdiction is patent and is not involved with other questions decided in the case, so

that this Honorable Court can easily eliminate it without the examination of a voluminous record and without passing upon the whole merits of the case, and it is apparent that this writ of error is prosecuted for delay, only.

Wherefore, these defendants in error ask this Honorable Court to dismiss this case, or to affirm the judgement of the Supreme Court of Texas.

Respectfully submitted,

A. W. HOUSTON,
Of Counsel for Johnson & Hansen,
Defendants in Error.

BRIEF SUBMITTED WITH FOREGOING MOTION TO DISMISS.

The plaintiff in error, the Union Trust Company of New York, in the Supreme Court of Texas, urged the following assignments of error, to wit:

III.

"The Court erred in adjudging that such of the creditors of the Railway Company as are adjudged to have a statutory lien, as named and classified by the Court in its decree, are entitled to priority in payment of their claims over the Company's first mortgage, because their lien was created by statute of February the 18, 1879, and the proof shows that said first mortgage was made on the 1st of May, 1878, and was recorded when the statute was passed and the bonds which it was made to secure had been issued and disposed of in part when said statute was passed, and to give said statutory lienholders priority of right to payment of their claims over said first mortgage is to make said statute retroactive and to impair the obligation of said mortgage contract, in violation of section 16 of the bill of rights of this State, and also in violation of section 10, Article 1 of the Constitution of the United States of America."

IV.

"The Court erred in adjudging that the claims in Exhibit B, aggregating thirteen thousand one hundred and thirteen dollars ($13,113), and the claims specified in Exhibit D, amounting to three thousand one hundred and forty-three dollars ($3,143), and the claims specified in exhibit E of the Special Master's report, amounting to five thousand one hundred and eighty-three dollars ($5,183), all of which are embraced in the Court's classification of "Statutory Claims" (Tr., p. 184 and 188), are liens, by statute or otherwise, on the railroad and appurtenances; because the Master's report (Tr. 142 and 143) shows, and there is no other testimony on this point, that they are not claims of mechanics, laborers, or operatives who had performed labor in construction or repair of the road, its cars, locomotives, or other equipments, or who had performed labor in operation of the road, and to whom wages were due and owing for such service within the statute entitled, 'An act to protect mechanics, laborers, and operatives on railroads in payment of their wages, and to provide a lien therefor' (R. S., p. 469). Hence, none of said claims come within the letter or spirit of said act.

"And for reason assigned in the third assignment of error, the Court further erred in adjudging said claims to have priority to payment over said first and second mortgages. But if they be held to be liens, then certainly they could not have priority over the first mortgage, which was made and recorded eight months before the statute was passed which gave the lien." (Rec., p. 1.)

These assignments present the only federal question raised or argued to the Supreme Court of Texas, and that Court, in passing upon said question, say in their opinion:

"The appellant Trust Company also insists that the Court erred in giving priority to the class of claims designated as claims having statutory liens. The Court found that the holders of these claims were secured by a lien upon the railroad and its equipments by virtue of

the act of February 18, 1879 (Sayles' Anno. St., Art. 3179–*a* and note). The first mortgage was executed before the passage of this act, and it is urged that by reason of this fact the act is inoperative as against the bonds secured by that mortgage. The argument is, that the act, as applied to the holders of obligations secured by mortgages existing on the railroad at the time the act took effect, is in derogation of the constitution of the State, and that of the United States, and is, therefore, void. We doubt whether this position can be successfully maintained (Institution *v.* Jersey City, 113, U. S., 506), but we do not deem it necessary to decide the question.

"The Special Master found that all these debts were due for labor performed in the construction, operation, and maintenance of the railroad within twelve months before the appointment of the receiver. The report in this respect was not contested. The claims are, therefore, of such a character as to entitle them to priority of payment out of the net earnings of the property in the hands of the receiver, unless priority should be denied them by reason of the fact that they did not accrue within the six months next preceding the receiver's appointment. When a court appoints a receiver of the property of a railroad company, and makes an order directing him to pay claims of its operatives for services rendered prior to the appointment, it would seem proper to prescribe a period of time within which the debts to be so paid should have accrued. But we think such an order should be only provisional, and that it could not properly be held conclusive against any one not a party to the suit at the time the order was made. In this case the Court, in accordance with the more general practice, fixed that limit as to time at six months before the receiver's appointment. Such a limit is purely arbitrary; but as long as it is simply provisional it is proper. The Court seems to have been of the opinion that the time fixed in the order of appointment should govern throughout the case. The rule laid down by the Courts is that the holders of claims for operating expenses have a right to the current means superior to that of the mortgage creditors, and that it continues until it is lost by such delay in the prosecution of their claims as should

be deemed sufficient to bar their equity. The period of time necessary for this purpose depends upon the circumstances of each particular case. That the period of the right is not dependent upon the implied consent of the bondholders to the order of the Court which appoints a receiver and directs the payment of claims of certain classes which have accrued within a fixed period of time prior to the order is shown by the case of Union Trust Co. *v.* I. Co., 117 U. S., 434, in which the mortgagees were not parties to the suit at the time the receiver was appointed and the order was made. The limitation not longer than six months has been the rule in the trial courts; but in the Supreme Court of the United States claims have been allowed which accrued for a much longer period before the receiver's appointment. In Hale *v.* Frost, *supra*, the claim of Hale, Ayer & Co., which was allowed priority, was for supplies to the machinery department furnished nearly two years before the receiver took possession. In Burnham *v.* Bowen, *supra*, it did not appear that the debt accrued within six months before the appointment. In the following cases also that limit appears to have been so regarded: Douglass *v.* Cline, 12 Bush, 608; Williamson *v.* Railroad Co., 33 Grat., 624; Skiddy *v.* Railroad Co., 3 Hughes (U. S.), 320; Atkins *v.* Railroad Co., *Id.*, 307. In Blair *v.* Railroad Co., 19 Fed. Rep., 861, the Court recognized liens accruing under the statutes of Missouri, and gave to similar claims from other States, where there was no statutes allowing such liens, an equal dignity. If it was meant to place them upon the same footing, merely as to the time of their accrual, the principle would seem sound. Equity follows the law; and if there be no law directly applicable, it will follow the analogy of the law.

"The creditors whose claims are now under consideration had a lien given by law upon the railroad and its equipments. Let it be conceded that it was subsidiary to the mortgages. They, nevertheless, had a lien as against the railroad company, and a right to enforce it against the equity of redemption in the property. The twelve months during which the right continued to exist had not elapsed when the Court took control of the assets of the company. We are of opinion that they

should not be held guilty of *laches* in prosecuting their claims until their liens were lost by delay and that the mere lapse of more than six months between the time in which the claims accrued and the appointment of a receiver does not afford a sufficient reason for denying a priority to which they would otherwise be entitled." (See Rec., pp. 19–21. S. W. Rep., vol. 13, No. 12, p. 653.)

Considering these statements from the record which contain the only reference to the federal question attempted to be raised in this Court by plaintiff in error, in his first assignment of error, we urge this—

Proposition of Law.

I.

The Supreme Court of the United States has no jurisdiction to review the decision of a State Supreme Court, unless it affirmatively appears that a "federal question" was not only raised and argued, but that the State Court decided it adversely to the plaintiff in error, and when the question is raised that a State statute is in derogation of the Constitution of the United States in that it impairs the obligation of a contract, it must appear affirmatively that the State Court held the statute valid as against the contract in question, and did not decide and could not have decided the case in the way it was decided on any other ground.

Adams Co. *v.* R. R. Co., 112 U. S., 123.
Chouteau *v.* Gibson, 111 U. S., 200.
Crossley *v.* New Orleans, 108 U. S., 105.
Bank *v.* McVeigh, 98 U. S., 332.
Bolling *v.* Lersner, 91 U. S., 594.
Kenebeck R. R. Co. *v.* Portland R. R. Co., 14 Wall., 23.
R. R. Co. *v.* People, 12 Wall., 384.
City Ry. Co. *v.* Guthard, 114 U. S., 136.
Jacks *v.* Helena, 115 U. S., 289.

Proposition of Law.

II.

When the question is not raised by assignment of error in Supreme Court of Texas it will not be considered by that Court.

Sayles Anno. Stats., Art. 1037.

Proposition of Law.

III.

Where the opinion of the State Court is in writing, and made a part of the record by statute (Sayles Anno. Stats. of Texas, Art. 1047), the Supreme Court of the United States will look to the opinion of the State Court (Rec., pp. 7 to 24) to ascertain whether a federal question was or was not decided.

Gross *v.* U. S. Mortg. Co., 108 U. S., 105.

In support of the second ground of the motion to dismiss, we direct the attention of the Court to the record of the case by which it appears that the only assignment of error urged in the Supreme Court of Texas against the defendants in error, Johnson & Hansen, was as follows :

VIII.

"The Court erred in the 5th subdivision of the 16th paragraph of its decree in adjudging that the said claim of Johnson & Hansen, and other claims hereinbefore classified as construction claims, and the aforesaid claim of Jacob Binz, which was a lien on earnings, are entitled to priority of payment *pari passu* with the operating expenses over the aforesaid mortgage debts.

"It will be seen by reference to the classification of claims as made by the Court in its decree in the column headed "Construction Claims" (see Tr., p), that the Court included in that column the following claims aggregating $39,246.16 reported by the Special Master as claims for material used in the construction of the new road, in Exhibit H of his report (Tr., p. 191)."

(Here follows the list of claims.)

"And also included in the same column the following claims aggregating $66,235.92 reported by said Special Master in Exhibit I of his report (Tr. p. 192) as claims upon promissory notes given for material used in construction of new road."

(Here follows list of claims, including claim of Johnson & Hansen.)

"The error complained of is in adjudging the above claims as entitled to priority of payment *pari passu* with the operating expenses over the mortgage debts (which necessarily includes the first mortgage); because the Court found by its decree (paragraph 14, Tr. p.) as the proof shows without contradiction, that the claim of Johnson & Hansen was for work and labor performed as contractors, within six months before the institution of this suit, in clearing, grubbing, and grading a portion of the line of said railroad, as found by the Special Master, and which was incomplete, and had not been received by the Railway Company at the institution of this suit. Now, no respectable authority can be produced to show that such claims are entitled to be paid *pari passu* with operating expenses or to priority of payment over existing prior mortgages. This error is claimed to apply to both the above classes as reported by the Master because the items in Exhibit H of his report pertain to the same work done by Johnson & Hansen." (Rec., pp. 4, 5.)

Upon which the Supreme Court of Texas in their opinion say:

"For convenience in determining the questions involved, we will first consider the construction claims. These were certain debts incurred by the receiver in constructing new road under the orders of the Court. There is no objection urged to giving these claims priority. It is, however, insisted that the Court erred in allowing priority to certain debts incurred by the company in constructing new road before the receiver was appointed. Though the doctrine is of recent origin, it has become settled law in this country that,

in the final distribution of the assets of an insolvent railroad corporation which has been placed in the hands of a receiver, there are certain claims against the fund which, under certain circumstances, are entitled to priority of payment over the debts of the corporation secured by mortgage upon its property."

Railroad Co. *v.* Cowdrey, 11 Wall., 459.
Fosdick *v.* Schall, 99 U. S., 235.
Hale *v.* Frost, *Id.*, 389.
Miltenberger *v.* Railway Co., 106 U. S., 286.

"The expenses of operating the railroad while in the hands of the receiver have been uniformly allowed, and it would seem that, as to claims of this class, there should never have been any serious difficulty. Being the expenses of administering the trust fund, they should be a first charge upon its funds, and should be awarded priority of payment. The cases cited also show that debts incurred by the company in operating its road, including necessary repairs and useful improvements, within a limited time before the appointment of a receiver, have at least, as to current earnings, been allowed a preference in payment over the bonded debts secured by mortgage upon its property; and, when the earnings have been diverted to the payment of interest upon the bonds and in making betterments upon the property, the holders of these claims have been reimbursed from the proceeds of the sale of the railroad. The reasons assigned for this doctrine are not the same in each of the cases. In Fosdick *v.* Schall, *supra*, the proposition was laid down that, when a Court of Chancery is asked by railroad mortagees to appoint a receiver of railroad property pending proceedings for foreclosure, the Court in the exercise of a sound judicial discretion may as a condition of issuing the necessary order impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement, as may, under the circumstances of the particular case, appear reasonable, and that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided or

lasting and valuable improvements made out of earnings which ought, in equity, to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the Court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. The opinion in this case was by Chief Justice Waite, and was concurred in by the whole Court. In Hale *v.* Frost, *supra*, the Supreme Court upon a certificate that the judges below were opposed in opinion expressly affirmed the proposition that the net earnings of the road, while in the possession of the Court, and operated by its receiver, are not necessarily and exclusively the property of the mortgages, but are subject to the disposal of the chancellor in the payment of claims which have superior equities if such shall be found to exist. And in Burnham *v.* Bowen, 111 U. S., 777, the Court say: Every railroad mortgagee in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income. Such being the case, when the Court of Chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad, and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say pay out from what it receives from earnings all the debts which, in equity and good conscience, considering the character of business, are chargeable upon such earnings In other words, what may properly be termed the debts of the income should be paid from the income before it is applied in any way to the use of mortgagees. The business of a railroad should be treated by a court of equity, under such circumstances, as a going concern, not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it. Such are the various principles announced in support of the modern doctrine, that, in the settlement and distribution of the assets of an insolvent railroad company, which have been placed in the hands of a receiver, priority of payment should be allowed cer-

tain claims over the mortgage debts. The principle of implied consent laid down in Fosdick *v.* Schall, *supra*, seems to have been disregarded in the case of the Union Trust Company *v.* Railway Company, 117 U. S., 434, in which the receiver was not appointed at the instance, either of the bondholders or of their trustee; but the doctrine is still maintained that creditors who have labored, furnished supplies, made repairs or usual improvements, in the operation, maintenance, and betterment of the road, and who have been suddenly deprived of their remedies at law by the appointment of a receiver, are entitled to the equitable consideration of the Court in the distribution of the assets of the company, and to priority in payment from the net income of the property while in the hands of the Court.

"As to what is commonly known as operating expenses, there is no difficulty, and so much is conceded in this case. The claims we now have under consideration are for construction of new road before the receiver was appointed, and for material furnished for such construction. They accrued within six months before the appointment. It has been held that claims for construction, unless the work was done or the material furnished in pursuance of an order of the Court, cannot be allowed priority. We may concede that as a general rule this is correct. But we think there may be construction claims which appeal as strongly to the conscience of a court of equity as the debts which are commonly known as operating expenses, and we further think we have such claims in those now under consideration. At the time the first mortgage was executed the railroad was but an inchoate enterprise. The fact of that mortgage shows that but a few miles had been completed, and that it was contemplated between the company and the mortgagees that the construction was to continue, and that the bonds secured by the mortgage should issue as the road progressed. The second mortgage also shows upon its face that the construction of the road was to continue. The mortgages covered not only the road which was completed at the time they were executed, but also that which was to be subsequently constructed. While the construction was still progressing the receiver was

appointed, and the holders of the claims deprived of their ordinary remedies for the collection of these debts. From the operation of the road the receiver made net earnings amounting to $270,721.44, a sum more than sufficient to pay these claims, and all others to which priority was allowed. This money was expended under the orders of the Court in paying interest on the bonds, and in making valuable and permanent improvement upon the property subject to the mortgages. The question here is as to the right of priority of payment out of the net earnings of the road while under control of the Court. The opinion in Fosdick *v.* Schall, *supra*, recognizes that debts incurred for 'useful improvements' have as to the net income a preference over the mortgage debts. We understand the term 'useful improvements' to include, not only necessary repairs, but also such changes in and additions to structures already completed as may be deemed advantageous to the road in a financial point of view, and such as prudent management would demand. Such, we would think, would be the debts created in substituting an iron and stone bridge for one made of wood. Such would be the expenses of a change from a narrow guage to a standard gauge when the exigencies of the traffic or other circumstances are such as to demand that change in order to prevent the utter failure of the enterprise, and to keep up the railroad as 'a going concern.' Ordinarily, when mortgages are issued upon completed roads, it is not contemplated that its income is to be applied to the construction of new road. In such cases debts incurred for such new construction ought to have no claim against the bondholders, either as to the *corpus* or the increase of the property. But when mortgages are executed upon an unfinished road, and they show upon their face that it was contemplated that the work of construction should be prosecuted to completion, and when the mortgages attach to the new road as fast as it is finished, we are of opinion that the new road should be considered a 'useful improvement,' and that, if the road be put into the hands of a receiver before the work and materials are paid for the holders of the claim for such work and material should be paid from the net income of the road while under control of the Court, if

there be any. The claims now under consideration accrued within six months before the appointment of a receiver, and the holders being guilty of no laches, were prevented by the action of the Court from subjecting the property to the payment of their debts through the courts of law. We think, therefore, it was the duty of the Court to protect them in its final decree, if there was on hand a fund which could be applied to the payment of their debts.

"The net earnings of the road were not on hand at the time of the trial, but had been expended by order of the Court in paying interest on the bonded debt, and in improvements upon the property subject to the mortgages, which enhanced its value to the full amount so expended upon it. In reference to the earnings of the road, counsel for this appellant expressly concede 'that the mortgagees' rights thereto, as against common creditors, did not attach until the trustee in the mortgages took possession in person or by agent, or by a receiver appointed at their instance.

"Their concession is the result of a well-established line of decisions in the highest Court of the country."

Railroad Co. *v.* Cowdry, 11 Wall., 459;
Gilman *v.* Telegraph Co., 91 U. S., 603.
Bridge Co. *v.* Heidelbach, 94 U. S., 798.
Fosdick *v.* Schall, *supra.*

"They insist, however, that, since they were not parties to the suit when the Court ordered funds to be applied to the several purposes mentioned, and since they cannot be considered as having consented to such application, the appropriation to the payment of interest and of improvements upon the road is not to be considered such a diversion as 'would require them to be reimbursed either by the mortgagees, or out of the *corpus* of the property.' We do not understand that the right of creditors having an equitable claim upon the net earnings of an insolvent railroad to be reimbursed when these earnings have been diverted to another purpose depends upon the consent of any party. The principle is not that the mortgage creditors are responsible for the diversion, but that the diversion was in derogation of the rights of those entitled to the funds, and that, therefore, the money should be restored.

"The bondholders have received the entire benefit of the diversion in this case, either directly, in money, or indirectly, in the enhancement of the value of the property subject to their mortgages; and, if they have no superior right to the net earnings, it follows that they have no right to complain of the action of the Court in restoring that fund from the proceeds of the sale of the mortgaged property. We have found no case in which preference to claims for work done and material used in construction of new road have been given a preference over debts secured by mortgage. On the other hand, there are several cases in which such preference has been denied, but we think each of these cases differs in some important particulars from this. In Hale *v.* Frost, 99 U. S., 384, a claim for construction material was denied priority. The report of the case is meager; but it would seem from a remark in the opinion in Williamson *v.* Railroad Co., 33 Grat., 631, that this material was used in the construction of an independent branch road. In Porter *v.* Steel Co., 120 U. S., 649, and Hand *v.* Railroad Co., 17 S. C., 219, the effort was, to charge the construction claims upon the railroad itself, in preference to the mortgage debts. It does not appear in either case that there was any net income from operation of the road while in the hands of the Court. From the report of the case of Addison *v.* Lewis, 75 Va., 701, it does not appear that there was any net income to the credit of the cause, or that it had been diverted. The petition of intervenor simply showed that their claim was due them as contractors in building an extention of the railroad without an averment, so far as the opinion shows of any other circumstance entitling them to equitable consideration. It follows that we are of the opinion that the Court did not err in awarding priority to the construction claims." (Rec., pp. 15–19.)

Considering which statements from the Record, we urge for the consideration of this Court the following:

PROPOSITION OF LAW.

Where there are several defendants in error, with different and distinct claims (as in this case), and a federal question is not raised and decided in the State Court, as to a part of the claims, the writ of error will be dismissed, or the case affirmed, as to such claims, although the jurisdiction may be sustained as to the others.

Murdock *et al. v.* Mayor, &c., of Memphis, 20 Wall., 590–642.

The assignment of error in this Court, as to the claim of these defendants in error being the second assignment of error, is as follows:

II.

"The Supreme Court of Texas erred to the prejudice of the plaintiff in error in adjudging and directing that the decree rendered by the Harris County District Court adjudging the several claims for the construction of new road constructed before the appointment of a receiver in this cause, designated and classified in the record as "Construction Claims," entitled to payment before the second-mortgage claims out of the earnings acquired after the receiver was appointed, and therefore as having priority over the second mortgage, that is to say: * * * (Here follows list of claims, including Johnson & Hansen's) * * * should be affirmed, and in adjudging costs in favor of said defendants in error against the plaintiffs in error; for the reason that the second mortgage executed December 19, 1884, before these claims, or any or either of them arose, conveyed the earnings of the road, and the mortgagee was entitled ro those earnings acquired after the appointment of the receiver, subject only to operating expenses and necestary repairs; and to allow the said claims for construction of new road a preference over the second mortgage was to impair the obligation of the second-mortgage contract in violation of section 10, Article 1 of the Constitution of the United States, and is to deprive a per-

son of his property without due process of law in violation of section 1 of Article 14 of the same Constitution." (Rec., pp. 27, 28.)

We urge that in view of the fact that no such point was raised, argued or decided in the State Court, this Court is not authorized to consider a case on writ of error upon such an assignment of error.

This Court is referred for reasons of this contention to the assignment of error hereinbefore quoted (Rec., pp. 4–5, *supra*) as made in State Court; to the opinion rendered in said State Court (Rec., pp. 7–24).

In support of the third ground of motion to dismiss we need only to cite the opinion of the Supreme Court of Texas (*supra*) and the other extracts from the record hereinbefore set forth which, in our opinion, are sufficient to convince this Honorable Court that its want of jurisdiction is patent, and that the writ of error in this case is prosecuted for delay only.

We respectfully ask that our motion be granted.

A. W. Houston,
Of Counsel for Johnson & Hansen,
Defendants in Error.

Office Supreme Court, U. S.
FILED,
OCT 24 1890
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

UNION TRUST CO., Plaintiff in Error,

vs.

JACOB BINZ, *et al.*, Defendants in Error.

In Error to the Supreme Court of the State of Texas.

MOTION TO DISMISS WRIT OF ERROR

—AND—

BRIEF IN SUPPORT OF MOTION.

J. S. PASTORIZA, PRT., HOUSTON.

IN THE

Supreme Court of the United States.

UNION TRUST CO., Plaintiff in Error,

vs.

JACOB BINZ, *et al.*, Defendants in Error.

In Error to the Supreme Court of the State of Texas.

MOTION TO DISMISS WRIT OF ERROR.

Now comes M. G. Howe, as receiver of the Houston East & West Texas Railway Company, one of the defendants in error in the above entitled and numbered cause, and makes known to the court that this cause was began and commenced in the District Court for Harris county, in the State of Texas, by the Houston East and West Texas Railway Company and certain of its stockholders and creditors as plaintiffs, against the creditors of said company, as defendants, for the purpose of having a receiver appointed to take possession of the property of said

railway company, and to operate the same until a final hearing of the cause could be had, and upon such final hearing a decree was asked ordering all the railway company's property to be sold as an entirety and the proceeds applied to the payment of the debts of said company as far as necessary, and the balance to be paid to the stockholders. [Trans. pp. 2 to 10.]

A receiver was appointed by the Judge of said District Court by an order made in chambers on the 8th day of July, 1885, with directions to him to take charge, possession and control of the property of said railway company, subject to the further orders of the court to be made in the cause. [Trans. pp. 10 to 14.]

All the different creditors of the company intervened in the case for the establishment of their respective claims against the railway company, and on the 19th day of November, 1889, the case was finally heard and determined by the said District Court, which court on that day made and rendered its final decree in the case, decreeing a sale of all the property of the company, and the application of the proceeds to the payment of the debts established against the company in accordance with their class, rank and priorities as fixed by this final decree.

From this judgment an appeal was taken by the plaintiff in error here, the Union Trust Company and others, to the Supreme Court of the State of Texas, which last mentioned court, on the 29th day of March, 1890, rendered its final judgment and decree in the

cause, affirming the judgment of the District Court, except in reference to two or three small claims, as to which the Supreme Court of Texas reversed the judgment of the District Court, and rendered such final judgment as the District Court should have rendered. [Trans. pp. 433 to 463 and 509 and 510.]

The Union Trust Company has obtained this writ of error to remove the case to the Supreme Court of the United States for the purpose of revising and correcting the judgment of the Supreme Court of Texas in the cause. [Trans. p. 533 *et. seq.*]

This defendant in error now moves the court to dismiss said writ of error and strike this cause from its docket, for the reason that this court is without jurisdiction to entertain, hear or determine this cause; because in deciding this cause the Supreme Court of Texas did not pass upon, decide or determine any question or questions wherein was involved or required to be decided the validity of any treaty or statute of, or any authority exercised under the United States; nor was any statute of, or authority exercised under any State decided to be valid, as against the constitution or any treaty or law of the United States; nor did the Supreme Court of Texas decide in this case against the validity of any title, right privilege or immunity claimed under the constitution or any treaty, statute of, or commission held, or authority exercised under the United States, specially set up by plaintiff in error or any other

party to this suit, under such constitution, treaty, statute, commission, or authority of the United States.

The first error assigned by the plaintiff in error in this court (see Trans. p. 556) wherein complaint is made of the action of the Supreme Court of Texas in affirming that part of the judgment of the District Court adjudging certain claims priority over the bondholders, which priority had been adjudged by said District Court on the statute of the State of Texas of February 18th, 1879, which statute the plaintiff in error claims was in violation of the constitution of the United States, does not upon the record in this cause present any question of which this court can, in this case, take jurisdiction, because an inspection of the opinion of the Supreme Court of Texas in the case (Trans. p. 527) shows that the priority of said claims was not sustained by the Supreme Court of Texas upon or by reason of said statute of the State of Texas, but upon the contrary, said priority was sustained upon other and different grounds, independent of said statute, and the opinion of the Supreme Court of Texas in the case expressly announces that said court does not decide the validity of said statute under the constitution or laws of the United States, nor its validity in any other respect.

The second error assigned in this court (Trans. p. 557) presents no question which this court has jurisdiction to determine in this case, because no question

under the constitution, laws or treaties of the United States was decided by the Supreme Court of Texas in adjudging priority to the construction claims referred to in said assignment of error; and said priority was not adjudged upon or by virtue of any statute of the State of Texas; nor was any such statute invoked in the case or claimed to be in violation of any provision of the constitution of the United States; nor did any of the parties in this suit specially set up or claim any right, title, privilege or immunity as to said construction claims under the constitution, or any treaty or law of the United States.

Wherefore this defendant in error prays that the writ of error herein be dismissed and the cause stricken from the docket.

Respectfully submitted,

W. C. OLIVER,
Attorney for M. G. Howe, Receiver.

Henry S. Fox, T. J. Todd, Neil McDonald and A. Blau, defendants in error in the above cause, join in the foregoing motion of M. G. Howe, receiver, to dismiss the writ of error in said cause and strike the same from the docket.

W. C. OLIVER,
Attorney for Said Defendants in Error.

IN THE

Supreme Court of the United States.

UNION TRUST CO., Plaintiff in Error,

vs.

JACOB BINZ, *et al.*, Defendants in Error.

In Error to the Supreme Court of the State of Texas.

ON MOTION TO DISMISS WRIT OF ERROR.

Brief in support of the motion of M. G. HOWE, Receiver, joined in by other Defendants in Error, to dismiss the Writ of Error.

The nature of the case is believed to be sufficiently stated in the motion to dismiss hereto annexed.

The defendants in error making the motion, submit that it being manifest from the record that no question was decided by the Supreme Court of Texas in this cause in such a manner as to give this Conrt jurisdiction of this case, the motion to dismiss should be sustained.

There being no complaint and no ground for any, that the proceedings in this cause in the District Court and in the Supreme Court of the State of Texas, were not in accordance with the regular forms and modes of proceeding in such cases, as prescribed by the laws of the land, and no federal question having been decided by the Supreme Court of Texas, and no decision of such question being necessary in order for that court to have rendered the judgment which it did in the case, it is no ground upon which this court can take jurisdiction, that the Supreme Court of Texas decided contrary to law.

If such a reason would entitle this court to jurisdiction in this case, then every case decided in the court of last resort of any State, where this court found that the decision was against the views of this court as to what was the law, would be subject to review in this court.

AUTHORITIES.

Blount vs. Walker, 134 U. S., 607-614, and authorities there cited.

Hopkins vs. McLure, 133 U. S., 380-387.

Hale vs. Akers, 132 U. S., 554-565.

Adams Co. vs. B. & M. R. R. Co., 112 U. S. p. 123-129.

Respectfully submitted,

W. C. OLIVER,

Attorney for Defendants in Error.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

Office Supreme Court U. S.
FILED.
NOV 15 1890
JAMES H. McKENNEY,
CLERK.

U. S. Supreme Court.

UNION TRUST COMPANY OF NEW YORK,
Plaintiff in Error,

AGAINST

THE HOUSTON, EAST AND WEST TEXAS RAILWAY COMPANY,
Defendant in Error.

Brief of plaintiff in error in answer to brief of counsel for Johnson and Hansen, two of the defendants in error, to dismiss the writ of error or [affirm the] judgment below.

The record discloses, that this suit was commenced in the District Court of Harris County, of the State of Texas, by the railway company and its stockholders against creditors of the company, alleging insolvency of the railway company, the recovery of judgment against it by some of the creditors, and asking judgment that the assets of the company be marshalled. sold and distributed as right might appear. Various creditors not made defendants intervened and answered and filed cross-bills as advised.

The plaintiff in error, the Union Trust Company of New York, among others, answered and filed cross-bill alleging that it held two mortgages on the property in

trust for bondholders and praying that they be adjudged liens with priority over all other creditors.

The Court considered all claims upon the fund and adjudged a sale and that the proceeds be distributed with certain specified priorities. Most of the defendants were directed to be paid thereout before the holders of bonds secured by the mortgages to plaintiff in error.

Record, p. 433 *et seq.*

The first mortgage bore date May 1st, 1878, and was then executed and delivered to the Trust Company, trustee (Finding V. in the judgment or decree, Record page 436); and a number of bonds were then issued thereunder (Finding 13, page 451 *et seq.*).

February 18, 1879, an act was passed known as Ch. 12, Laws 1879, page 8, in the following language:

SECTION 1. Be it enacted by the Legislature of the State of Texas, that all mechanics, laborers and operatives who may have performed labor in the construction or repair of any railroad, locomotive, car or other equipment to a railroad, or who may have performed labor in the operating of a railroad, and to whom wages are due or owing, shall hereafter have a lien prior to all others upon such railroad and its equipments for such wages as are unpaid.

SEC. 2. In all suits for wages due by a railroad company for such labor as heretofore mentioned, upon proof being satisfactorily made that such labor had been performed, either at the instance of said company, a contractor, or sub-contractor, or agent of said company, and that such wages are due, and the lien given by this act is sought to be enforced, it shall be the duty of the Court having jurisdiction to try the same to render judgment for the amount of wages found to be due, and to adjudge and order said railroad and equipments, or so much thereof as may be necessary, to be sold to satisfy said judgment; in all suits of this kind

it shall not be necessary for the plaintiff to make other lien holders defendants thereto, but such lien holders may intervene and become parties thereto, and have their respective rights adjusted and determined by the Court.

SEC. 3. Suits by mechanics, laborers and operatives for their wages due by railroad companies, may be instituted and prosecuted in any county in this State where such labor was performed, or in which the cause of action or part thereof accrued, or in the county in which the principal office of such railroad company is situated, and in all such suits service of process may be made in the manner now required by law.

SEC. 4. The lien created by this act shall cease to be operative in twelve months after the creation of lien, if no steps be sooner taken to enforce it.

SEC. 5. It being important that the benefits of this act be realized at once, because the parties to be benefited by this act have no adequate protection under existing law, creates such imperative public necessity and an emergency as requires that it be of effect and force on its passage, and it is so enacted.

SEC. 6. That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed.

Approved February 18, A. D. 1879.

Took effect from its passage.

The claims made under this statute are classified in the judgment as the statutory claims (Record, pp. 446 to 450 inclusive).

The Court adjudged that the property described belonged to the Railway Company, and constituted a trust fund subject to sale and distribution under orders of the Court (Record, p. 454, finding 2d). It ordered a sale (pp. 455–6, findings 6 and 7).

It directed that the proceeds of sale be first applied to the payment of all statutory claims. That operating and *construction* claims should next be paid.

The mortgage bonds were behind all (Record, p. 459. finding 10).

The *judgment* of the Texas District Court thus gave to a statutory lien, given by a statute passed subsequently to the making of the mortgage to plaintiff in error and issue of bonds thereunder, a priority of lien over such mortgage, thus impairing the obligation of the contract of mortgage.

The Supreme Court of Texas, on appeal, *affirmed* that judgment, with exceptions not important to notice.

In its *opinion* the Supreme Court says that it is not necessary to discuss the invalidity of that statute of Texas, because the statute is valid as against the Railway Company and thus the lien as against the Railway Company is created, and that being in existence by force of the statute *equity* will give it priority.

POINTS.

First. It would seem clear that this Court has jurisdiction to consider the question of the priority of the statutory claims.

The Court of original jurisdiction entertained them as statutory claims.

But for the statute they would have no lien. They were urged in and sustained by the Court of original jurisdiction as pure statutory liens.

The Supreme Court of Texas makes the liens by virtue of the statute *subsidiary* only and then by equity gives them priority.

Without the statute, however, they would have been no liens *at all*.

Thus, we find that if there had been no statute there would have been no lien; with the statute the Supreme

Court of Texas says that there is a lien, and that it is prior to the lien of our mortgage.

We do not now submit any argument as to this novel effort of the Supreme Court of Texas to disregard the constitutional provision, prohibiting the passing of a law impairing the obligation of contracts, by claiming that the statute gives the lien only, and that equity gives the priority.

Its plain defect is that the whole argument is founded on the statute; without this statute it could not be made, and by means of the statute, so *equitied*, the obligation of our prior contract is impaired.

All that we now submit is that the question of the priority of that statutory lien, even though aided by any Texas equity, presents, at least, a grave federal question, and one which the Court will consider only on the final argument of the case.

Second. This being a case where the debtor Railway Company and its stockholders filed a bill to ascertain debts and distribute assets, and the judgment being one for sale and distribution, the writ of error must run to all the parties to the suit below.

The writ with the proper bond is a *supersedeas*

If the case is properly here as to one defendant in error, it is properly here as to all.

All are interested in the rights that may be adjudged to any in the fund in controversy.

The case below cannot be proceeded with so long as the question between plaintiff in error and the statutory claimants is undecided.

There is, therefore, nothing to be gained by the parties moving to dismiss by a partial or fragmentary hearing of the cause.

The writ of error cannot be dismissed as to one defendant in error only. It must be as to all or none, and if not as to all then as to none.

The writ must name and run to every party to the judgment.

Deneale vs. Stump, 8 Peters, 526.
Wilson vs. Ins. Co., 12 Peters, 140.
Smyth vs. Strader, 12 Howard, 327.
Davenport vs. Fletcher, 16 Howard, 142.

As the defendants now moving are thus necessary parties to the writ of error, it would seem clear that the writ cannot be dismissed so long as a Federal question is raised in the record as between plaintiff in error and any defendant in error.

Third. If, however, the suit were between the plaintiff in error and the defendants in error, Johnson & Hansen, alone, this Court would have jurisdiction.

The Railway Company makes a mortgage, and thereby obtains money to build its road. It employs the defendants in error to do some of the work and does not pay them.

The defendants in error are simple contract creditors, without the pretense of a lien of any kind.

The Supreme Court of Texas adjudges that for their benefit the property of the plaintiff in error shall be taken and given to the defendant in error—a purely arbitrary act, without the semblance of a judicial basis to rest upon.

It is in conflict with the 14th Amendment in that it deprives the plaintiff in error of property without due process of law and denies to it the equal protection of the laws.

Suppose that a complaint had been filed in the Court below, stating that plaintiff in error had some property which defendant in error wanted, and praying the Court to take it from the plaintiff in error and give it to the defendant in error, and the Court had so adjudged, would not this Court say that it was depriving plaintiff

in error of its property without due process of law—that the act of the Court was not judicial, but was without jurisdiction and trespass?

Well, the case at bar presents substantially that case. Without the slightest pretense that the defendants in error, Johnson & Hansen, have any lien—with the avowal that there is no case giving any lien to a contractor for construction—with the fact before it that the Legislature had passed a railroad lien act in 1878 (quite unnecessary if the law were as the defendants in error claimed), the District and Supreme Courts of Texas decree that the lien or property owned by the plaintiff in error shall be given to the defendant in error.

No Court has jurisdiction or power to do such a thing, and if it be done it is a deprivation of property without due process of law.

It is not intended to argue this case on this motion, but merely to call the attention of the Court to the questions involved. The record has not been printed and the time has been too short to prepare an argument, but we submit that the questions are such as to require the deliberate attention of the Court.

WHEELER H. PECKHAM,
Of Counsel for Plaintiff in Error.